> of frivolous and groundless rate complaints and to quickly dispose of such complaints, cable operators will be reluctant to make the financial investment to support the development of new programming services and the continued improvement of existing services.[90/]

The only way to minimize this problem and to prevent widespread reductions in expenditures that might seriously impair the quality of existing and new programming services is to establish benchmarks of "unreasonableness" with respect to non-basic rates at levels that require only the true renegades whose rates most exceed the median to reduce their rates. Even a benchmark that subjected five percent of systems to complaints would, in conjunction with the effects of basic rate regulation, have a substantial effect on the business of cable operators and cable programmers. Moreover, a benchmark that subjected more than a small number of systems to non-basic rate complaints would quickly engulf the Commission in a morass of rate proceedings. As we pointed out, a benchmark that treated the rates of only five percent of systems as unreasonable would allow subscribers of 554 systems to initiate complaint proceedings. And at least one complaint from each such system would not be unlikely, since there would be 2,760,000 subscribers eligible to bring such complaints.[91/]

90/ Lifetime Television Comments at 14. See also, e.g., Arts and Entertainment Network Comments at 15-17; ESPN, Inc. Comments at 9-10; Time Warner Entertainment Company, L.P. Comments at 42-43.

91/ See Owen, Baumann and Furchtgott-Roth at 23.

For these reasons, we proposed that benchmarks for non-basic rate regulation be established at a level that classifies only a very small percentage of existing rates as "unreasonable." And, for reasons fully discussed in our initial comments,[92/] we proposed that the standards of unreasonableness be based on systems' combined rates and revenues for basic service (including equipment) and non-basic "cable programming service." As we pointed out, "a cable system should not be discouraged from charging lower basic rates and higher non-basic rates, so long as its overall rates are not unreasonable."[93/] Moreover, the adoption of basic rate benchmarks may require certain retiering and repricing by cable operators, which "may result in generally higher rates for non-basic service and generally lower rates for basic service, without increasing overall revenues."[94/]

For similar reasons, CFA proposes that any price cap or benchmark for regulating "cable programming service" be based on total rates for basic and non-basic services, in order to allow reasonable retiering:

> This approach would not only be a specific and easily implemented approach to two of Congress' primary goals in the Act -- preclusion of retiering harm and ease of challenge to unreasonable rates for cable programming service -- it would preserve the incentive to provide a low priced basic tier. Cable operators could make up

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92/ See NCTA Comments at 60-61.

93/ Id. at 60.

94/ Id.

> revenue for below-average-channel pricing in the basic tier by above-average-pricing in the other tiers, as long as they impose no harm by retiering (i.e., as long as the overall price per channel is within the Commission's overall price cap).[95/]

Thus, while there may be disagreement as to how and at what level the price cap or benchmark for "cable programming services" should be set, CFA and NCTA are in agreement on a fundamental point: Any such benchmark or price cap should be based on combined rates or revenues from all regulated tiers and equipment -- basic and non-basic.

IV. PROCEDURES FOR IMPLEMENTATION OF RATE REGULATION

In adopting procedures implementing these new regulations, the overriding goals of the statute are to ensure expeditious resolutions of disputes and consistent application of substantive standards and administrative procedures, and to reduce the burdens on operators, as well as regulators, and subscribers. These goals will be ill-served if many of the procedural roadblocks proposed -- primarily by representatives of the cities -- are adopted. In order to avoid stifling the continued development of cable television systems throughout the United States, there must be certainty and expedition in rate regulation, not flexibility and delay.

It is equally important that operators not be constrained in the first place by rate regulation if effective competition

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95/ CFA Comments at 96.

exists now or in the future. Congress has clearly defined when that competition is present. Yet, the comments of the Local Governments seek to have the Commission interpret this definition in a manner that can only serve to raise the hurdle to a finding of "effective competition" even higher than Congress intended.

A. Definition of "Effective Competition".

First, Local Governments argue[96/] that the Commission incorrectly proposes to measure penetration by competitors to cable cumulatively. They claim that a single competitor must serve 15 percent of the households in a franchise area. Such a reading conflicts with the plain meaning of the statute, however. It expressly provides that "the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video distributor exceeds 15 percent of the households in the franchise area...." Section 623(l)(B)(ii) (emphasis added). This cumulative determination of competition is also supported by the legislative history.[97/] The Commission's proposal to aggregate the penetration of competitors is also consistent with its current rules regarding whether multichannel competitors provide

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96/ Local Governments Comments at 10.

97/ See 138 Cong. Rec. S.14253 (Sept. 21, 1992) (colloquy between Senators Lieberman and Inouye regarding calculation of penetration rate of unaffiliated distributors).

"effective competition" to a cable system.[98/] The same approach is warranted here.[99/]

Second, Local Governments argue that in order to offer "comparable video programming" under the effective competition test, a competitor must offer approximately the same number of channels as the cable system, and propose a test depending on whether there is a 20 percent or less differential in the number of channels offered by competitors.[100/] Other commenters propose that the Commission consider the "quality" of the programming presented by the competitor.[101/]

In focusing on the number of channels or quality of programming, rather than the "comparability" of the video programming, as the statute requires, these tests miss the mark. The rate regulation provision is not designed to deal with a competitor's access to cable programming services. Rather, it

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98/ Report and Order and Second Further Notice of Proposed Rule Making, 6 FCC Rcd. 4545, 4554 (1991) (calculating penetration of alternative delivery services by combining the number of subscribers to all available alternative services).

99/ See CFA Comments at 114 (agreeing with Commission's proposal to consider all qualifying distributors cumulatively).

100/ Local Governments Comments at 11-14.

101/ See, e.g., New York State Consumer Protection Board Comments at 5; The Wireless Cable Association Comments at 14 (suggesting that in order to be "comparable", an MMDS service must provide the programming services "most demanded by subscribers ... such as the major broadcast networks, ESPN, CNN, HBO, TNT and others ...."); Coalition Comments at 19.

focuses on whether consumers have a choice in the video marketplace of viewing comparable programming and whether those competitors act as a price restraint on cable service. Indeed, the Commission in its 1991 effective competition decision recognized that these viewing alternatives "will truly provide a market constraint on the rates for basic cable service of more established cable multichannel service providers."[102/]

The Commission therefore should, as the Notice suggests, "presume that such comparability exists ... if a competitor offers multiple channels of video programming and the numerical test for the offering of and subscription to competitive service under the second test are met."[103/] If 15 percent of the households in a franchise area find a competitive video programming service more to their liking than a local cable system's service, it is entirely reasonable to assume that those viewers find the competing multichannel service to provide programming "comparable" to that of the cable system -- regardless of whether that competitor presents a different number of channels than the cable system or presents diverse program offerings not contained on the cable system.

Third, Local Governments propose that the Commission examine the marketing practices of a competitor within a particular community to determine whether a competitive service offered to

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102/ 6 FCC Rcd. at 4554.

103/ Notice, para. 9.

at least 50 percent of the households in the franchise area is "actually available." In particular, they urge that a nation-wide DBS service should not be deemed "actually available" unless a DBS distributor is actively marketing in a particular community.[104/] Again, the Commission previously rejected this position, finding that "DBS will be considered to be available to the entire United States when any one DBS licensee begins operation."[105/] Local Governments have presented no evidence as to why a different conclusion should be reached here.

Finally, given the virtually insurmountable obstacles that the Local Governments plan to place in the way of finding "effective competition", it is not surprising that they also propose that the Commission "presume" that effective competition does not exist in any cable community.[106/] But a reading of the statute reveals that the Local Governments have inverted the burden imposed by Congress. For Congress clearly stated that the Commission must "find"[107/] that a cable system is not subject to effective competition in order for its rates to be regulated.

104/ Local Governments Comments at 15.

105/ 6 FCC Rcd. at 4554 n.52.

106/ Local Governments Comments at 24; See also Coalition Comments at 32.

107/ Section 623(a)(2). While Local Governments argue in support of their position that the Commission employs a "presumption" of a lack of effective competition under its current rules, the 1984 Cable Act did not contain a requirement that a "finding" be made. 47 U.S.C. Section 543(b)(1).

Therefore, as our initial comments describe,[108/] there is no jurisdiction to regulate cable rates until such a "finding" has been made.

B. Regulation of Basic Service Rates.

1. Scope of FCC's Direct Regulation

In our initial comments in this proceeding, NCTA endorsed the Commission's tentative conclusion that its authority to directly regulate basic tier rates is "quite limited."[109/] Indeed, the language of the statute and its legislative history specify those few instances in which direct Commission regulation of basic rates is allowed -- in the interim period between denying or revoking a franchising authority's certification and then only until it is reinstated.[110/]

Moreover, the statute does not mandate that franchising authorities regulate basic rates; rather, it is permissive: "any franchising authority may regulate the rates for the provision of cable service ...." [111/] It makes sense to allow franchising authorities to make this choice. A locality may well decide that an operator's rates are appropriate and decide not to engage in the rate regulatory process, even assuming that it has the legal

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108/ NCTA Comments at 65-67.

109/ Notice, para. 15.

110/ NCTA Comments at 64; House Report at 81.

111/ Section 623(a)(1) (emphasis added).

authority to do so.[112/] In cases where those regulators most familiar with their community's cable system choose not to regulate, there is no public interest reason for the Commission to step in and regulate those basic tier rates.

Nor, we submit, is there any authority in the Act for the FCC to do so. While Local Governments and CFA[113/] claim that the Commission has overarching authority to regulate basic service rates in all instances except where a franchising authority is certified to regulate rates, they advance a wholly unpersuasive reading of the statute in support of this view.

For example, Local Governments claim that the language of Section 623(b)(1), which provides that "the Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable", somehow grants the Commission overall responsibility to exercise jurisdiction over basic tier rate regulation. But properly viewed in the context of the statutory scheme as a whole, this provision means only that the Commission, rather than a franchising authority, is charged with devising regulations regarding rates for basic service tier that can be applied by local franchising authorities if they choose to -- and are qualified to -- regulate basic tier rates.

112/ See, e.g., New York State Commission on Cable Television Comments at 8 (agreeing with Commission's tentative conclusion that the Commission may not regulate basic service rates unless it has denied or revoked a franchising authority's certification.)

113/ Local Governments Comments at 19; CFA Comments at 123-130.

Their argument also ignores the plain meaning of Section 623(a)(2)(A) -- which declares that "the rates for the provision of basic cable service shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6),[114/] in accordance with the regulations prescribed by the Commission under subsection (b)...." Under Local Governments' and CFA's reading, this limited exception for the exercise of jurisdiction by the Commission would swallow the rule.

Just as Local Governments misread the Commission's power to regulate basic rates, so, too, do they misconstrue a franchising authorities' power to do so. They argue, among other things, that Section 623(a)(2)(A) is "an independent source of power [for franchising authorities] to regulate rates." [115/] But this reading conflicts with the requirements of Section 623(a)(3) that make clear that a franchising authority must have the "legal authority" to adopt regulations governing rates. If the Act itself provided the requisite "legal authority," this requirement would be meaningless.

114/ Section 623(a)(6) provides that "if the Commission disapproves a franchising authority's certification ... or revokes such authority's jurisdiction ..., the Commission shall exercise the franchising authority's regulatory jurisdiction under paragraph (2)(A) until the franchising authority has qualified to exercise that jurisdiction by filing a new certification that meets the requirements of paragraph (3)."

115/ Local Governments Comments at 30.

Local Governments also allege that "the absence of rate regulation provisions in a franchise agreement is not a bar to a franchising authority's right to regulate rates," [116/] and cite language from the House Report in support of this proposition.[117/] But the language upon which they rely is not reflected in the language of the statute, which specifically requires a franchising authority seeking certification to have "legal authority." In any event, this statement at most can be read to support the proposition that if a franchise agreement is silent on the issue of rate regulation, a franchising authority may nonetheless regulate rates under the new statutory scheme, if it otherwise has the legal authority to do so. But if a franchising authority has affirmatively agreed not to regulate cable rates, then the franchising authority would have no legal authority to regulate rates.

Similarly, contrary to Local Governments' claim,[118/] Section 623 of the Act does not preempt state laws prohibiting rate regulation. A franchising authority would have no power to regulate rates if a state had prohibited cable rate regulation -- or if a state had not granted such authority to a local franchising authority. Local franchising authorities are

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116/ Id. at 28. See also Coalition Comments at 35 (arguing that "the Act abrogates any existing franchise agreements that prohibit rate regulation or are silent on the issue.")

117/ House Report at 81.

118/ Local Governments Comments at 28.

authorized or chartered under state constitutional or statutory authority and so derive their powers from the state. Again, the fact that Congress specifically included a requirement that franchising authorities must have the legal authority to regulate rates demonstrates its intent not to confer such authority or to preempt state laws deregulating rates.

C. Basic Rate Procedures.

The Act directs the Commission to adopt procedures to reduce the administrative burdens on operators as well as franchising authorities.[119/] This goal would not be achieved if operators were faced with inconsistent rate regulation procedures and requirements from community to community. But that is likely to occur if the Commission were to adopt the suggestions contained in the comments of representatives of franchising authorities that they should have maximum "flexibility" to design their own procedures and processes for reviewing cable basic rates so long as they are not "irreconcilable" with those adopted by the Commission, [120/] or that they may "impose additional requirements or consider factors not specified by FCC regulations, as long as those requirements are not in conflict with FCC regulations and consistent with the Act."[121/]

119/ Section 623(b)(1).

120/ Local Governments Comments at 34.

121/ Coalition Comments at 35.

However, "consistency", not "flexibility", is what the statute demands.[122/] Moreover, Section 623(b)(5) expressly provides that the Commission's regulations shall include "additional standards, guidelines and procedures concerning the implementation and enforcement" of its basic service regulations, including "procedures by which cable operators may implement and franchising authorities may enforce the regulation prescribed by the Commission under this subsection." Section 623(b)(5)(A). This detailed legislative scheme simply belies the notion that each municipality should have the flexibility to devise its own set of procedures and consider whatever factors they deem appropriate, so long as they are not "irreconcilable" or "in conflict" with those adopted by the Commission.

We do not believe that the Commission need adopt a detailed procedural scheme at this point. But at a minimum, it should adopt procedures that ensure that basic rates within the benchmark adopted by the Commission are promptly granted by the franchising authority;[123/] that permit an operator whose rates exceed the benchmarks to make a showing to demonstrate to the franchising authority that its costs justify rates higher than

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122/ Section 623(a)(3)(A).

123/ Under the benchmark approach that we have proposed, there would be no need for operators to submit cost data to franchising authorities justifying a basic tier rate so long as the rate was within the benchmark. Therefore, the Commission should make clear that such underlying information is not "needed" for "purposes of administering and enforcing" Section 623.

the benchmark; that require franchising authorities to respond in writing to such showing; and that provide for review by the Commission, under a de novo standard, of any decision rejecting an operator's proposed rates.

D. Timetable for Action on Revocation.

While the Local Governments' comments claim to appreciate the need for "certainty" to "enable cable operators to plan for the future growth of a cable system in terms of, for example, upgrades and investments in programming,"[124/] they propose procedures that are wholly inconsistent with this admitted need. Rather than fostering the future growth of cable, their suggested procedures would stifle development by needlessly introducing uncertainty into the process.

Their insensitivity to the need for certainty and expedition is most strikingly illustrated in their proposed timetables for franchising authority action. For example, Local Governments oppose the Commission's proposal to require a response by the cities to a revocation petition within 15 days. [125/] They instead suggest that the Commission allow cities three months in which to respond to such a petition, and "additional time, if necessary." They also propose that even after a franchising

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124/ Local Governments Comments at 8.

125/ Id. at 36.

authority has submitted its response, that the burden be on an operator to meet a higher threshold than demanded by the Act in order to obtain revocation of the certification -- that it demonstrate that a franchising authority's rate regulatory power is "substantially" inconsistent with the Commission's regulation.[126/] And even after the Commission has found a violation, the franchising authority, according to the Local Governments, should have yet a further "reasonable period" to "suggest" how to cure this violation, and then more time to simply certify that the city will comply.

The cities, however, neglect to consider that during this entire prolonged process, an operator could be faced with the prospect of having its proposed basic rate increase held hostage to a city that has neither the legal authority, personnel, nor procedures in place warranting the authority's exercise of any jurisdiction over basic cable rates. This dilatory proposal should be rejected outright as inconsistent with the Act's expedition requirement. Instead, the Commission, as it proposed, should impose and require strict adherence to the 15 day time frame proposed in the Notice. It should not adopt rules, such as those proposed by Local Governments, that will only serve to encourage foot dragging and prolong disputes.

126/ Id. at 38.

E. Timeframe for Review of Basic Service Tier Rates.

As described above, the Local Governments support a benchmark approach, in part to ensure that the regulatory structure adopted by the Commission does "not impose undue administrative burdens on subscribers, cable operators, franchising authorities, or the Commission."[127/] Yet, at the same time, Local Governments propose that they be afforded 120 days plus an additional 90 days -- for a total of seven months -- in which to review rates.[128/] It is simply inconceivable that a franchising authority that is acting in compliance with the Commission's procedural and substantive rules would need even the initial 120 day period Local Governments propose in which to determine whether a basic service rate is within the benchmark. And affording an additional 90 day period to seek more information and in which to reach a final decision will only encourage further protracted delays -- delays that will only be compounded if a franchising authority's ultimate decision, no matter how erroneous, remains in effect pending resolution at the

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127/ Id. at 42.

128/ Id. at 56. The analogy Local Governments make to the Commission's time frame for review of the often voluminous and complex common carrier tariffs is inapt. An operator's compliance with the benchmark will be readily determinable, and no further documentation in support of the rate will be needed.

FCC.[129/]

Local Governments' attempt to square their proposal to obtain an extended review process with the Act's 30-day advance notice provision is unpersuasive. If Congress had intended the prior notice provision merely to serve as a trigger for franchising authority review, it would have had no need to include any specific time period at all -- in other words, operators would have been required to provide notice to franchising authorities before any rate increase, subject to the franchising authorities' approval. But in including a specified time period of 30 days for advance notice, Congress must have contemplated that time frame to have some meaning. Therefore, the statutory language is much more consistent with NCTA's proposal, in its initial comments, that an operator's rate increase should be permitted to go into effect automatically at the end of the 30 day period, subject to roll back if subsequently it is determined to be unreasonable.[130/]

F. Remedial Powers.

The Local Governments propose a wide range of remedies to "reduce current basic rates that are deemed unreasonable", and ask that the Commission grant franchising authorities

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129/ Id. at 67.

130/ NCTA Comments at 73.

"flexibility."[131/] They also suggest that they possess the right to roll back cable rates to where they were on "October 5, 1992 -- the date the 1992 Cable Act was enacted."[132/] But the cities' comments reveal a fundamental misunderstanding of their -- and the Commission's -- task in regulating rates. As we described in our initial comments in this proceeding, and as the Commission has recognized,

> the Act contemplates and encourages 'a restructuring of service offerings' by cable operators to comply with rate constraints. The object of the Act -- and, particularly of the Commission's proposed benchmark approach -- is not to ensnare cable operators whose rates are too high in protracted regulatory proceedings. The object is to establish rules that define reasonable rates for basic service and unreasonable rates for non-basic tier.[133/]

Operators should not be penalized for engaging in this restructuring, either prior to the rules' effective date or

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131/ Local Governments Comments at 63-66. The Commission certainly should not sanction remedies that would deem an operator to have been in violation of the law or franchising agreement simply because it had proposed a rate increase that ultimately was determined by a franchising authority not to be reasonable. As the House Report makes clear, "a finding that rates are unreasonable is not to be deemed a violation of law subject to the penalties and forfeitures of the Communications Act. Compliance with a Commission order to reduce rates shall be deemed compliance with applicable law." House Report at 88. Such an approach should be equally applicable to local franchising authorities.

132/ Id. at 84-85. Their Comments imply that this power arises from the "evasions" provision of the Cable Act.

133/ NCTA Comments at 85 (quoting Notice, para. 5)

during a transition period. Nor is it permissible under the statute for franchising authorities to order rate rollbacks or refunds for rate increases taken during the period prior to the effective date of their certification. Franchising authorities only have jurisdiction under the Act to implement the rate regulation provisions adopted by the Commission. And they can only exercise their power after the FCC has adopted rules and has certified the franchising authority to implement these provisions.

Moreover, unlike the Act overall, the rate regulation provisions of the Act specifically do not take effect until April 3, 1993.[134/] Therefore, operators not subject to rate regulation have lawfully taken rate increases under the 1984 Act. Franchising authorities cannot reach back to require refunds for that period.

In any event, the Cable Act does not grant franchising authorities the power to order refunds in any circumstances. The Act specifically grants the Commission this right in the case of complaints filed regarding cable programming service.[135/] Since Congress specifically addressed this issue in one part of the section, its silence on this issue in the context of franchising authority basic tier regulation must be construed to mean that franchising authorities do not have this power.

134/ Act, Section 3(b).

135/ Section 623(c)(1)(C).

G. Procedures for Regulation of "Cable Programming Services".

In our initial comments, we expressed our view that enabling franchising authorities to assist subscribers in filing complaints might be one way to reduce the Commission's burden of processing complaints relating to rates for cable programming services. In no way did we suggest, however, that franchising authorities should play any role whatsoever in the adjudication of such complaints. The Local Governments, to the extent that they envision such a role, have a fundamental misunderstanding of the role of franchising authorities in the review of "cable programming service" rates.

First, the statute unambiguously separates responsibility for the regulation of "cable programming service" rates from regulation of the basic tier rates -- and vests responsibility for the former exclusively with the Commission. There is absolutely no support in the statute for the Local Governments' suggestion[136/] that franchising authorities can or should conduct substantive rate regulatory proceedings with respect to non-basic rates or establish any rates for these services -- or that these local determinations should be entitled to any weight whatsoever. Local Governments' suggestion that these decisions be subject to review by the Commission under an "arbitrary and capricious"

136/ Local Governments at 72.

standard[137/] only serves to demonstrate how overreaching their proposals are.

We initially supported the Commission's view that franchising authorities might play some limited role in assisting subscribers in filing complaints about cable programming service, because such a role might prevent the Commission from being flooded with non-meritorious complaints. But based on the comments of Local Governments, we fear that involving franchising authorities will have the opposite effect, needlessly increasing the burdens on operators, multiplying the number of frivolous complaints filed, and prolonging resolution of any genuine rate dispute.

CFA proposes an equally unworkable approach. It reads the Act to "contemplate only that subscribers would be required to 'allege' that the rates 'could' be unreasonable."[138/] But if that is the standard, there is absolutely no protection against the Commission and operators being overrun by frivolous complaints. There must be some showing -- short of a "prima facie" case -- that would enable the Commission as an initial matter to quickly identify and dispose of baseless complaints.

In order to avoid overwhelming operators with complaints, moreover, we oppose CFA's apparent suggestion that any time a

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137/ Id.

138/ CFA Comments at 139.

complaint is filed containing this minimum "showing", the burden automatically shifts to operators to demonstrate the reasonableness of their rates.[139/] Instead, operators with rates that are within the range of rates that are per se not "unreasonable" should be free not to respond to the complaint, as the Notice proposes.

We continue to believe that in order to reduce uncertainty, and to best effectuate the Act's requirement that complaints be filed "within a reasonable period of time", complaints must be filed within 30 days after a subscriber receives notice of a rate change. Local Governments propose, however, that subscribers be given three times as long to submit complaints -- 90 days.[140/] The Commission, under their proposal, would then have up to 210 days to complete its review. In all, this process could take almost a year. Given the dynamic nature of the cable industry, this extended process would effectively -- and needlessly -- deter improvements in the quality of service. A franchising authority will have 30 days' notice, just as subscribers will, that cable programming service rates are to go up. There is no good reason why a complaint cannot be filed within 30 days of receipt of that notice -- and plenty of good reasons why

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139/ Id. at 140.

140/ Local Governments Comments at 73-74.

prolonging the complaint period would not serve the public interest.

H. Geographically Uniform Rates Structure.

We are in basic agreement with Local Governments that the geographically uniform rate provision of the Act "should not be interpreted to prohibit the establishment of reasonable categories of service with separate rates and terms and conditions of service, or reasonable discrimination in rate levels among different categories of customers -- provided that the rate structure containing such discriminations is uniform through out a cable system's franchise area."[141/] But for the reasons set forth in the comments of several cable commenters, the Commission should also make clear that this provision does not preclude an operator's ability to negotiate different rates within a franchise area with different multiple dwelling units("MDUs").[142/]

I. Negative Options.

In our initial comments, we endorsed the Commission's proposed interpretation of the negative option provision contained in Section 623(f) to mean that a change in the

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141/ Local Governments Comments at 80; NCTA Comments at 78.

142/ See, e.g., Adelphia Communications Corp. et al. Comments at 125-130 (discussion of individually-negotiated contracts with MDUs).

composition of a tier accompanied by a price increase should not be considered a negative option.[143/] We also contended that an operator "splitting" a former single basic tier into basic and expanded basic service tiers would not be engaging in negative option billing prohibited under the Act, inasmuch as the subscriber already has affirmatively requested those particular services.

Local Governments and CFA, however, appear to confuse the issue of rate increases with negative options. The Conference Report and the Commission's Notice make clear that changes in the mix of program services would not be a negative option prohibited under the Act.[144/] Contrary to the suggestions contained in the Local Governments'[145/] and CFA's comments,[146/] this conclusion does not hinge on whether prices are increased as a result of this change in a service tier. A subscriber, of course, may always cancel service -- or file a complaint with the Commission -- if it objects to paying an increased rate for a tier of service that it has already requested. But that does not mean that a subscriber should be able to veto, in advance, the addition of a particular program service because the tier's rate

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143/ See Notice, paras. 119-120; NCTA Comments at 79-80.

144/ NCTA Comments at 80; Conference Report at 80; Notice, para. 120.

145/ Local Governments Comments at 86.

146/ CFA Comments at 158.

will go up. If an operator is still afforded the ability to alter the mix of program services on a tier, as the legislative history makes clear, then it must be able to change that mix and increase prices for the tier -- without being subject to remarketing that particular service tier to all existing subscribers.

In short, the negative option billing prohibition should be confined to those limited circumstances intended by the Act -- where subscribers are charged for a completely new program package or service that a subscriber is not already taking without their affirmative request. The Commission should make clear that these circumstances are indeed narrow. Rate increases are a separate matter altogether -- one in which Congress granted separate authority to regulate.

J. Evasions.

As we described in our initial comments, and as the Commission's Notice suggests, operators may well be forced to take measures to rearrange their program offerings in order to come into compliance with the Commission's rate regulation rules. Indeed, there is little dispute among the commenters that this new regime will lead to changes, and in fact the Local Governments' comments recognize that "many cable operators have